

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION G-3349

May 22, 2003

R E S O L U T I O N

Resolution G-3349. On the Commission's own motion, this resolution rescinds Resolution G-3273, which granted Southern California Gas Company's request to offer a Newspaper Subscription Service.

SUMMARY

Pursuant to Section 1708 of the California Public Utilities Code (Section 1708), this Resolution rescinds Resolution G-3273, which granted Southern California Gas Company's request to offer a Newspaper Subscription Service. Section 1708 states in part, "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it."

BACKGROUND

On June 7, 1999, SoCalGas filed Advice Letter 2812 pursuant to Affiliate Transaction Rules VII.¹ The advice letter requested authorization to sell

¹ Rule VII of the Commission's Affiliate Rules issued in Decision (D.) 97-12-088 on December 16, 1997, and modified in D.98-08-035 (effective August 6, 1998) addresses the procedures for utilities to follow in order to offer new, "nontariffed" products and services.

newspaper subscriptions to its customers whenever they call the utility to request a gas service turn-on or transfer.²

On March 2, 2000, Resolution G-3273 granted Advice Letter 2812 with conditions.

Subsequently, at the Commission meeting of September 5, 2002, the Commission discussed its concerns regarding newspaper solicitation services by public utilities within its jurisdiction.

Then on September 19, 2002, the Commission unanimously voted down Draft Resolution E-3697, which would have approved Southern California Edison's (Edison) Advice Letter 1436-E. Edison's Advice Letter 1436-E requested authorization to continue its Newspaper Solicitation Service.

On April 17, 2003, the Commission approved Draft Resolution E-3793, which denied Edison's requests to continue its Newspaper Solicitation Service.

DISCUSSION

At the meeting of September 5, 2002, the Commission revisited the issue of newspaper solicitation services and discussed the following concerns:

- A customer's call to establish, change, or discuss service, should not be subjected to a sales "pitch" for newspaper solicitations.
- Telephone solicitation business is unrelated to the core mission of the utilities, which is to provide customers with safe and reliable electric and/or gas service.
- There are concerns with the privacy implications of the utility being able to provide its customers' information to others for profit without full control of the later use of that information.

² Notice of AL 2812 was made by publication in the Commission's Daily Calendar. SoCalGas states that a copy of the Advice Letter was mailed and distributed in accordance with Section III-G of General Order 96-A.

- The Commission does not have the resources to enforce safeguards to protect utilities' customers' privacy.
- The Commission has no jurisdiction over newspapers and does not have the resources to ensure that the customer's information (regarding phone number and address) is not sold to other telemarketers or any other third party.
- Newspapers are often the editorial critics of the utilities; thus, there may be a conflict of interest in utilities' selling newspaper subscriptions.
- The Commission should not encourage utilities to spend time and effort on matters other than their core mission of providing utility service.

Because of these concerns, as more fully discussed below, and pursuant to the Commission's regulatory mandates and administrative authorities, the present Resolution G-3349 rescinds SoCalGas's Resolution G-3273 addressing Advice Letter 2812 and orders SoCalGas to terminate its Newspaper Subscription Service within 30 days of the effective date of the Resolution.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution was mailed to all parties to Advice Letter 2812 for comments on March 18, 2003. Section 311(g)(1) of the California Public Utilities Code provides that a Draft Resolution must be served on all parties and subject to at least 30 days public review and comment prior to a final vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding. The 30-day comment period was neither waived nor reduced.

SoCalGas filed comments on the Draft Resolution on April 4, 2003. These comments were resubmitted to the Commission on April 15, 2003 with an attached cover letter from SoCalGas's parent corporation, Sempra Energy (Sempra). The cover letter essentially reiterates the comments of SoCalGas. The comments of both SoCalGas and its parent are summarized as follows:

1. The Draft Resolution rescinding the approval of SoCalGas's use of its call center to enlist subscribers to regional newspapers violates Section 1705 of the California Public Utilities Code (Section 1705) because it does not contain separately stated findings of fact on all material issues, and it violates Section 1708 because it does not provide SoCalGas and other interested parties an opportunity to be heard.
2. SoCalGas's newspaper subscription program does not involve the same concerns as expressed by the Commission in rejecting the program of Edison.
3. The rescission of SoCalGas's newspaper subscription program could raise customer rates based on estimated revenues for the test year 2004.

We have reviewed and considered the comments carefully and have decided to order SoCalGas to terminate its Newspaper Subscription Service.

DISCUSSION ON COMMENTS

The Draft Resolution, at page 3, set out the statements of the Commissioners regarding the telephone solicitation of newspaper subscriptions by public utilities using utility personnel and equipment. The Commissioners stated, among other things, that:

Telephone solicitation business is unrelated to the core mission of the utilities.

The Commission does not have the resources to enforce safeguards to protect utilities' customers' privacy.

These statements are based on the Commission's administrative authority to decide how it is to use its resources to fulfill its Constitutional and statutory mandates.³ In accordance with these administrative concerns expressed by the Commissioners, the Draft Resolution directed SoCalGas to terminate its

³ See, Cal. Pub. Util. Code §§ 701 and 702.

newspaper solicitation program, thus rescinding a prior decision in Resolution G-3273 issued March 2, 2000 that had approved the program.

In its comments on the Draft Resolution, SoCalGas argues that the rescission order violates Section 1708 because it was not provided with an opportunity to be heard as in the case of complaints. Section 1708 indeed requires an opportunity to be heard, but does not order that an evidentiary hearing be conducted for each and every occurrence of a rescission or modification of a prior decision. The statute provides that the Commission may alter, amend, or rescind any order or decision upon notice to the parties and "with opportunity to be heard as provided in the case of complaints..." SoCalGas certainly has had notice and has had the opportunity to be heard as the comments it has filed, with an emphasis provided by Sempra's reiterations, demonstrate.

With respect to the procedures for enforcement and complaint cases, i.e., adjudication proceedings, the Commission is authorized by statute to determine whether a hearing is necessary and the kind of hearing required consistent with due process, public policy, and statutory requirements.⁴ SoCalGas has not been limited as to the extent of the comments it has filed, nor precluded from submitting information by affidavit with its comments. The Commission has heard SoCalGas's reasons for objecting to the rescission of its telemarketing authorization, but the factual data presented by SoCalGas, even if true, are not material or dispositive with respect to an administrative determination that the Commission's resources should no longer be used to oversee SoCalGas's solicitation of newspaper sales.

The Commission's decision is not based on whether SoCalGas can succeed in selling newspapers, but whether the Commission wants to use its resources to review telemarketing operations and the use of utility assets for this kind of non-utility service, as the Commission must do in regulating SoCalGas. The costs and revenues of the program must be incorporated into SoCalGas's accounts and ratemaking, thereby imposing additional review, auditing, and analysis obligations for the Commission in fulfilling its regulatory duties.

For example, in the original resolution that authorized SoCalGas's newspaper solicitation program, the Commission ordered SoCalGas to maintain various

⁴ Cal. Pub. Util. Code §§ 1701.1(a), 1701(c)(2), 1702(a).

records and submit reports to the Commission. SoCalGas was ordered to track “the fully-loaded costs of the program,” its “solicitation training for customer service representatives as a cost of the program,” and “the fully-loaded costs for its other nontariffed [meaning non-rate scheduled] offering categories.” SoCalGas was also to make periodic reports to the Commission, including any changes to the solicitation script used when customers are offered the newspaper subscriptions. The Commission’s Energy Division was also directed to review the scope of the annual Affiliate Audit, including nontariffed offerings and their consistency with the representations made by the SoCalGas. (Resolution G-3273, March 2, 2000, at 18.) Clearly, the program involved tracking accounts that would have to be considered by the Commission’s staff as it affects SoCalGas’s customers and relevant Performance Based Ratemaking elements.

SoCalGas also argues that an evidentiary hearing is necessary to show that its method of selling newspaper subscriptions does not raise concerns for customer privacy. The Commission, however, cannot simply authorize and then ignore a service that takes advantage of SoCalGas’s privileged access to customer information when that information is transferred to an entity, such as a newspaper, that is beyond the Commission’s jurisdiction should that information be misused. The Commission is not persuaded by SoCalGas’s argument that the transfer of private information occurs with the customer’s “explicit permission,” as stated in SoCalGas’s comments at page 4, item (3) (1), and that SoCalGas thus assumes the customer has willingly taken the risk of any consequences of the transfer of private information.

The Commission would be remiss to expose utility customers to the possibility of the misuse of the private information or to run the risk itself of having to employ Commission resources in dealing with potential legal ramifications related to the use of customer information. There is no requirement that the Commission wait and see what the statistics are with respect to the preservation of utility customer privacy, or wait and see the extent to which it becomes involved in consumer complaints and related legal process. The Commission is making, therefore, a discretionary, administrative decision not to incur these unnecessary obligations arising from a non-utility service.

The California Constitution, Art. XII, §§2 and 6, and Section 454 of the California Public Utilities Code confer upon the Commission broad discretionary authorities. (*San Diego Gas & electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 914-915; *Wise v. Pacific Gas and Electric Company* (1999) 77 Cal. App. 4th 287, 293.)

As a public agency, furthermore, the Commission cannot be forced to exercise its discretion in a particular manner. (See, e.g., *Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App. 4th 1793, 1799, citing *Manjares v. Newton* (1966) 64 Cal. 2d 365, 370.)

The Commission is not required, therefore, to hold an evidentiary hearing to justify or submit to cross-examination its administrative determination in declining to oversee a telemarketing program unrelated to SoCalGas's utility operations. It is not required to submit to SoCalGas in an evidentiary hearing process either a detailed study of its deliberations in prioritizing its regulatory duties and the myriad regulatory issues the Commission must resolve, or a detailed budget analysis to support its decision.⁵

There is, therefore, no violation of Section 1708 in the rescission of the Commission's prior authorization of SoCalGas's program. An evidentiary hearing is not required because there are no issues of fact to be resolved that are material to the Commission's discretionary, administrative determination.

Our response is similar with regard to SoCalGas's comments that the Draft Resolution violates Section 1705 because it does not contain separately stated findings of fact on all issues material to the rescission of SoCalGas's prior authorization. Contrary to SoCalGas's assertion, Finding of Fact No.1, that the Commission has denied Edison authorization to continue its newspaper solicitation, is material and establishes that the Commission's order to have SoCalGas terminate its newspaper solicitation program is in fact a discretionary order intended to preclude and terminate such programs by public utilities under its jurisdiction as a matter of administrative policy. That order reflects the Commission's authority to determine the necessary and appropriate use of Commission resources that should be devoted to implementing regulatory laws, regulations, and rules for the provision of safe and reliable public utility services

⁵ Cf., *Sklar v. Franchise Tax Board* (1986) 185 Cal. App.3d 616, 622. (The courts should not "invade the area of discretion with which an administrative agency is vested over a given subject matter.") *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1806, citing *Gilbert v. State of California* (1990) 218 Cal. App.3d 234, 241. ("A court may not substitute its discretion for that properly vested in an administrative agency.") SoCalGas cannot claim a right to do what the courts may not do.

by franchised utility corporations at just and reasonable rates. In that context, SoCalGas has not identified or stated in its comments the material factual findings that were missing from the Draft Resolution and that would be necessary to support the order that SoCalGas discontinue newspaper solicitations.

We will, nonetheless, include herein an additional, separately stated Finding of Fact referring to the Commission's determination that it will no longer expend its time, money, or personnel, as would be necessary, to oversee SoCalGas's partnership with newspapers in promoting subscription sales to utility customers.

FINDINGS OF FACT:

1. At the Commission meeting of September 5, 2002, Commissioners expressed concerns, as set forth herein, regarding newspaper solicitations by public utilities, and stated that the Commission's resources are inadequate to be used to incorporate the sale of newspaper subscriptions in its regulation of public utilities.
2. On September 19, 2002, the Commission unanimously voted down Draft Resolution E-3697 that would have authorized Edison to continue a newspaper solicitation service.
3. On April 17, 2003, the Commission approved Draft Resolution E-3793, which denied Edison's requests to continue its Newspaper Solicitation Service.
4. For the reasons discussed herein, the Commission has determined not to use its limited resources to oversee SoCalGas's telephone solicitation business, which is unrelated to its fundamental mission of providing customers with safe and reliable utility services.

THEREFORE IT IS ORDERED THAT:

1. SoCalGas' Resolution G-3273, which authorized its telephone solicitation service for newspapers as requested in Advice Letter 2812, is rescinded.

2. SoCalGas shall terminate its Newspaper Subscription Service within 30 days of the effective date of this Draft Resolution.
3. SoCalGas shall inform the Energy Division's Director by letter, within 30 days, that it has terminated its Newspaper Subscription Service.

This Resolution is effective today, May 22, 2003.

I certify that the foregoing Resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on May 22, 2003, the following Commissioners voting favorably thereon:

WILLIAM AHERN
Executive Director

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners